IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1888

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
a Foreign Corporation,

Appellant,

vs.

JOSEPH and BARBARA J. FALZON,
Individually and as Next Friend of
JOSEPH D. FALZON, STEVEN FALZON, RODNEY FALZON
and RAMON FALZON, minors

Appellees.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

APPELLEES' MOTION TO DISMISS OR AFFIRM

BRIEF IN SUPPORT OF MOTION TO DISMISS OR AFFIRM

APPENDIX

ZEFF & ZEFF
By: MICHAEL T. MATERNA
RONALD W. SZCZESNY
Attorneys for Appellees
607 Shelby Street, Suite 200
Detroit, Michigan 48226
(313) 962-3825

GROMEK, BENDURE & THOMAS
By: MARK R. BENDURE
Attorney for Record for Appellees
577 E. Larned, Suite 210
Detroit, Michigan 48226
(313) 961-1525

THE INLAND PRESS, DETROIT, MICHIGAN

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1888

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
a Foreign Corporation,
Appellant,

vs.

JOSEPH and BARBARA J. FALZON,
Individually and as Next Friend of
JOSEPH D. FALZON, STEVEN FALZON, RODNEY FALZON
and RAMON FALZON, minors
Appellees.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

APPELLEES' MOTION TO DISMISS OR AFFIRM

NOW COME Appellees, JOSEPH FALZON, et al, by and through their undersigned counsel, and hereby move this Honorable Court to dismiss or affirm the "appeal" filed by Appellant VOLKSWAGEN AKTIENGESELLSCHAFT, ("VWAG") and in support hereof submit that:

1. The state court rulings which Appellant seeks to have reviewed do not involve or decide the "validity" of any "Treaty . . . of the United States", as the validity of the Hague Treaty has been uniformly accepted by Appellees. Since the State decisions have involved nothing more than the construction and application of that Treaty to the facts of the instant case, Appellant's claims are not within the appellate jurisdiction conferred on this Court by 28 USC § 1257(1) and are reviewable, if at all, only by certiorari.

2. The State court rulings which Appellant seeks to have reviewed do not involve the "validity" of any "statute of [the] State", but only Appellant's claim that the General Court Rules of Michigan are inapplicable to it. Appellant's claims are therefore not within the appellate jurisdiction conferred on this Court by 28 USC § 1257(2) and are reviewable, if at all, only by certiorari.

3. The pre-trial order from which VWAG seeks to appeal is not a "final judgment", and is therefore not within the appellate jurisdiction conferred on this Court by 28 USC § 1257(1) and 28 USC § 1257(2), or the certiorari jurisdiction conferred by 28 USC § 1257(3).

4. It is manifest that the questions on which the pre-trial discovery order depends are so unsubstantial as not to need further argument.

5. The pre-trial discovery order from which Appellant seeks to appeal rests on an adequate non-federal basis.

6. In further support of their Motion to Dismiss or Affirm, Appellees incorporate by reference their Brief in Support of Motion to Dismiss or Affirm attached hereto.

ZEFF & ZEFF, P.C.

BY: MICHAEL T. MATERNA
RONALD W. SZCZESNY
Attorneys for Appellees
607 Shelby, Suite 200
Detroit, Michigan 48226
(313) 962-3825

GROMEK, BENDURE & THOMAS

BY: _____
MARK R. BENDURE
Attorney of Record for Appellees
577 E. Larned, Suite 210
Detroit, Michigan 48226
(313) 961-1525

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Constitution, Statutes and Rules

United States Treaties and Memoranda

Michigan Law and Authorities

Other State Authority *Page*

Other Authorities

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1888

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
a Foreign Corporation,

Appellant,

vs.

JOSEPH and BARBARA J. FALZON,
Individually and as Next Friend of
JOSEPH D. FALZON, STEVEN FALZON, RODNEY FALZON
and RAMON FALZON, minors

Appellees.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

BRIEF IN SUPPORT OF MOTION TO DISMISS OR AFFIRM

STATEMENT OF THE CASE

Appellant VWAG seeks to appeal from a pretrial order, entered in a Michigan product liability action, which allows the questioning of some of its German employees by American consular officials in Germany ("consular questioning"). The developments which culminated in this appeal are as follows.

On October 27, 1974, Appellees FALZON (plaintiffs in the pending Michigan lawsuit), were involved in an automobile

accident while riding in a Volkswagen microbus.[1] The accident occurred in Michigan where Appellees reside, where Appellant does business, and where the vehicle was purchased. Joseph Falzon and Barbara Falzon, husband and wife, were ejected from the vehicle, and both were rendered quadriplegics. Their four children also suffered serious injuries in the crash.

Appellees then filed a product liability action in Wayne County Circuit Court, a Michigan trial court of general jurisdiction. Among the defendants is VWAG, a West German Corporation which designed and manufactured the vehicle in West Germany, and then imported it to the United States for sale in Michigan. Appellees contend that negligence in the design of the microbus resulted in their injuries. The design features with which Appellees take issue are the windshield retention and adhesion system, the door latch system, lack of cross-wind stability, and rollover and passenger ejection characteristics.

At the time suit was filed, the American and German governments had adopted a bilateral agreement allowing consular questioning for the purpose of taking testimony in litigation pending abroad. This agreement is reflected in the Notes Verbales of 1955 and 1956 which are found at 61a-66a.

Meanwhile, a multi-national pact known as the Convention on Taking of Evidence Abroad in Civil or Commercial Matters (hereinafter "Hague Treaty") had been promulgated. The Treaty set forth minimal procedures which each signatory nation agreed to extend to all other signatory nations ("the world at large"), while reserving the right of any two countries to permit more liberal procedures as among themselves.

The Treaty had been ratified by the American government prior to the commencement of this litigation, 28 USC § 1781,

[1]The contents of this Statement of the Case are taken primarily from the Certified Concise Statement of Facts and Proceedings issued by the trial judge on March 4, 1982, which is found as Appellant's Appendix, pp. 8a-22a.

but was not ratified by West Germany until June 26, 1979 (69a). In ratifying the Treaty, Germany declined to extend consular questioning privileges to the world at large (50a). A question then arose as to whether Germany thereby intended to revoke the consular questioning privileges which had previously been extended to America. Through diplomatic channels, both governments confirmed that the consular questioning privileges established by the Notes Verbales of 1955 and 1956 continued. The continuing agreement to consular questioning is reflected in the Notes Verbales of October 17, 1979 and February 1, 1980 (67a-71a).

On April 18, 1980, counsel for Appellees advised defense counsel that he would be scheduling depositions of Appellant's design engineers in Germany at a later date. For the next three months, counsel for Appellant concurred with this procedure (see 1b-4b). On July 23, 1980, with the depositions two weeks away, Appellant filed a Motion to Quash depositions, raising a number of objections, including the contention that the depositions sought by Appellees would offend the Hague Treaty.

Over the period July through December of 1980, the parties filed numerous pleadings addressed to the discovery issue. The respective arguments are summarized at 13a-20a. During this period, Appellant submitted affidavits from its employees who were the proposed deponents. A representative affidavit is found at 6b.

On October 7, 1980, the trial judge issued an order (24a-25a) permitting Appellees to attempt to obtain the testimony of the deponents. The Order reflects "this Court's desire for the Michigan General Court rules control of these proceedings as much as possible" and requires that "the Notes Verbales of 1955 will control the course of the taking of these depositions". On December 5, 1980, the trial court denied Appellant's Motion for Reconsideration of the October 7, 1980 Order. The trial court did not issue an opinion or otherwise explicate the basis

of its Orders of October 7, 1980 and December 5, 1980.

In due course, Appellant filed an Application for Leave to Appeal to the Michigan Court of Appeals.[2] The Application was denied without opinion on May 27, 1982 (3a). The Supreme Court of Michigan denied Appellant's Application for Leave to Appeal to that Court on February 22, 1983 (2a). This disposition was also without opinion.

At present, the Michigan product liability action remains pending, as trial has been adjourned until the resolution of the discovery issue. By Order of Justice O'Connor dated May 26, 1983, discovery proceedings have been stayed pending the disposition of Appellant's appeal to this Court.

OPINIONS AND ORDERS BELOW

The Michigan Courts have not issued any opinions regarding the issue which VWAG seeks to present. The pretrial Order of the Wayne County Circuit Court from which Appellant appeals is found at 24a-25a. The Order denying rehearing thereon is found at 23a. The Orders of the Michigan Court of Appeals and Michigan Supreme Court denying applications for leave to file an interlocutory appeal are respectively found at 3a-4a and 1a-2a.

JURISDICTION

Appellant VWAG relies on 28 USC § 1257(1), 28 USC § 1257(2) and 28 USC § 1257(3) as conferring on this Court jurisdiction to accept and decide its appeal. Appellees FALZON submit that no such jurisdiction is conferred by 28 USC § 1257.

---

[2]In the Michigan appellate system, an appeal of right exists from "all final judgments" of the Circuit Courts, GCR 1963, 806.1. Where the Circuit Court Order in question is not final, the dissatisfied litigant may seek leave to file an interlocutory appeal under GCR 1963, 806.2(2). Appellant's pleadings in the Michigan Court of Appeals sought a discretionary interlocutory appeal under Rule 806.2(2) rather than an appeal of right from a "final judgment" under Rule 806.1.

ARGUMENT IN SUPPORT OF MOTION TO DISMISS OR AFFIRM

I.

THE STATE COURT RULINGS DO NOT INVOLVE OR DECIDE THE VALIDITY OF THE HAGUE TREATY OR MICHIGAN STATUTES, AND THEREFORE NO APPELLATE JURISDICTION EXISTS UNDER 28 USC § 1257(1) or 28 USC § 1257(2).

In its Jurisdictional Statement, Appellant relies on 28 USC § 1257, which states:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> "(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.
>
> "For the purposes of this section, the term 'highest court of a State' includes the District of Columbia Court of Appeals."

Given the alternative arguments proffered by Appellees in support of the Order, and the lack of any opinion by the state courts explicating the basis of the rulings now under attack, it is far from clear that any federal issues were ever resolved on the merits. Indeed, it is likely that the Michigan decisions were

predicated on adequate non-federal grounds (Argument IV, *infra*).

Even if it can be assumed *arguendo* that the trial court's orders reflect an implicit interpretation or construction of the body of law contained in the Hague Treaty and Notes Verbales, this implicit interpretation of federal law does not fall within the jurisdiction conferrerd by 28 USC § 1257(1). Appellate jurisdiction exists under § 1257(1) only where the "*validity* of a treaty" is drawn in question "and the decision is against its *validity*".

In the instant case, Appellees have never argued that the Hague Treaty is "invalid." The Michigan courts have never questioned the "validity" of the Treaty, and Appellant is unable to point to anything in the state court proceedings which even remotely suggest that the Treaty has bene judicially invalidated.

To be sure, this case involves questions as to the interpretation, scope, or applicability of the Treaty, but such questions do not implicate the unquestioned "validity" of the statute. Stern & Gressman, Supreme Court Practice (5th ed), pp. 159-160 explains that appellate jurisdiction will not lie under 28 USC § 1257(1) to review a decision which does no more than implicitly interpret or apply a federal treaty or statute:

> "It is essential, for purposes of an appeal under § 1257(1), that the state court deny 'validity' to a federal treaty or statute. This means that the state court must directly inquire into and deny the power to make the treaty or to pass the statute. *See Baltimore & Potomac R. Co.* v *Hopkins,* 130 U.S. 210. To be appealable, the state court decision must hold the treaty or statute invalid in whole or in part as applied to the particular circumstances of the case. *Flournoy* v *Wiener,* 321 U.S. 253, 263. Such a holding must be explicit. Even though the alleged invalidity of the treaty or statute be timely and properly raised in the record, the state court must do something more than remain silent or ambiguous before a denial of validity will be ascribed to its action. The Supreme Court's jurisdiction under §1257(1) must

> rest upon far firmer ground than guesswork as to the nature of the state court decision. Moreover, it is not enough that the state court merely construes the treaty or statute so as to deny a claim thereunder, or that it views the facts so as to place the litigant outside the scope of the federal law."

As the State courts have never explicitly held the Hague Treaty invalid, Appellant's claims do not fall within the appellate jurisdiction conferred by 28 USC § 1257(1). Its appeal must therefore be dismissed and its claims, if reviewed at all, must be reviewed by certiorari.

Appellant's claims likewise fall beyond the appellate jurisdiction conferred by 28 USC § 1257(2). Such jurisdiction exists only where the "validity" of a "statute of any state" is unsuccessfully challenged as "repugnant to the . . . treaties . . . of the United States". In the instant case, Appellant has never challenged the "validity" of any Michigan enactment.

The critical provisions of state law are General Court Rules ("GCR 1963") 302.1 (permitting the deposition of "any person, including a party"), 305.1 (service of notice of taking deposition on a party or its attorney is sufficient to require appearance of that party's employees) and GCR 1963, 304.2[3] (9b). Rule 304.2 expressly authorizes the taking of depositions in a foreign country before a consular agent of the United States (the same procedure authorized by the Notes Verbales).[4] Appellant has never contended that the Michigan Court Rules are unconstitutional or invalid (see 13a-20a, summarizing the arguments presented to the trial judge).

---

[3]The Michigan General Court Rules are promulgated by the Supreme Court of Michigan and govern Circuit Court procedure. For present purposes, it will be assumed that the General Court Rules constitute a "statute" as that term is used in 28 USC § 1257(2).

[4]Since Rule 304.2 expressly allows the procedure utilized by the trial court, Appellees are at a loss to explain the curious absence of that Rule from Appellant's Appendix (see 53a-60a). VWAG's failure to as much as cite GCR 1963, 304 in its Jurisdictional Statement or Appendix makes clear that the "validity" of that Rule is not "drawn in question".

Absent a direct attack on the validity of the Michigan General Court Rules, the appellate jurisdiction conferred by 28 USC § 1257(2) has been erroneously invoked. The most that can be said of Appellant's argument in the state courts is that it has accepted the *validity* of the Court Rules but asserted that federal rights prevent its application to it. Such an argument below does not trigger appellate jurisdiction under § 1257(2). As Stern & Gressman, Supreme Court Practice (5th ed), pp. 163-164 explains:

> "[I]t is necessary for appeal purposes that the litigant make specific and plain in the state court his contention that the application of the statute to his particular circumstances would make the statute void under federal law. If he chooses not to phrase his claim in that manner but argues instead that his federal rights prevent application of the state statute to him, an adverse decision amounts to a denial of his assertion of federal rights rather than a validation of the state statute, and review can be had in the Supreme Court only via certiorari under §1257(3)."

Insofar as Appellant asserts an appeal under 28 USC § 1257(1) or (2), its claims are outside the scope of the Court's appellate jurisdiction. Its quest for review, if cognizable at all, is cognizable only by certiorari. Appellant's appeal must therefore be dismissed.

II.

A PRE-TRIAL ORDER, WHICH MAY LATER BE REVIEWED BY THE STATE APPELLATE COURTS ON AN APPEAL OF RIGHT, IS NOT A "FINAL JUDGMENT" AND IS THEREFORE NOT WITHIN THE JURISDICTION CONFERRED BY 28 USC § 1257.

Central to the jurisdiction established by 28 USC § 1257 is the limitation that review may had only of "final judgments or decrees rendered by the highest court of a State". If the order in question is not a "final judgment", this Court lacks jurisdiction to review the dissatisfied litigant's substantive arguments

by either appeal or certiorari. *San Diego Gas & Electric Co* v *San Diego*, 450 US 621, 630, fn. 10 (1981).

Traditionally, the vexing "finality" requirement of 28 USC § 1257 and 28 USC § 1291 has been viewed as requiring that the decision to be reviewed "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment", *Coopers & Lybrand* v *Livesay*, 437 US 463, 467 (1978); *Firestone Tire & Rubber Co* v *Risjord*, 449 US 368 (1981). Plainly, a pretrial discovery order presented for review prior to trial on the merits is not "final" in the traditional sense.

Apparently recognizing the non-finality of the order, VWAG adverts to *Cox Broadcasting Corp* v *Cohn*, 420 US 469 (1974) and *Cohen* v *Beneficial Industrial Loan Corp*, 337 US 541 (1949) as supportive of its invocation of the Court's § 1257 jurisdiction (Jurisdictional Statement, pp. 2-3, fn. 1). the principles addressed in those cases do not support the claim that jurisdiction exists to review the Order involved in this case.

Cox Broadcasting Corp recognized limited circumstances justifying departure from the traditional interpretation of "finality". Among the requirements necessary to meet the *Cox Broadcasting Corp* relaxed test of finality is a showing that, while the totality of the litigation has not been concluded, the federal issue has been "finally" resolved.[5] That test is plainly

[5]This Court has recognized four distinct situations in which a state court order may be deemed "final" despite the fact that further state court proceedings are required. *Cox Broadcasting Corp*, 420 US at 479-485; *Flynt* v *Ohio*, 451 US 619 (1981). Three of these situations arise where "the federal issue [is] finally decided by the highest court in the State" (*Cox Broadcasting Corp*, 420 US at 480), "where the federal claim has been finally decided [and] later review of the federal issue cannot be had" (*Id.*, 420 US at 481) or where "the federal issue has been finally decided in the state courts [and] reversal of the state court on the federal issue would be preclusive of any further litigation" (*Id.*, 420 US at 482-483). All three of these situations contemplate that the federal issue has been so firmly resolved that it cannot be reexamined or later reviewed in a state court appeal. The instant case fits none of these three categories.

The fourth category of *Cox Broadcasting Corp* finality consists of "those cases in which there are further proceedings . . . but . . . the federal issue is conclusive or the outcome of further proceedings is pre-ordained" (*Id.*,

unmet in the instant case.

The decision of the trial judge is not necessarily the "final" word from the Circuit Court on the federal questions. While the case remains pending, the Circuit Court retains the power to modify or vacate the orders which Appellant seeks to have reviewed, GCR 1963, 518.2. Thus, the Orders in question are not necessarily the "final" decisions of the Circuit Court on federal questions.

Nor have the Michigan appellate courts "finally" resolved even the federal questions. They have done nothing more than decline to grant *interlocutory* appellate review.[6] After trial on the merits, VWAG may pursue an appeal of right under GCR 1963, 806.1. At that time, the State appellate courts *will* "finally" decide the federal question on its merits. At *that* juncture this Court's jurisdiction may be properly invoked. As the final judgment of the Michigan appellate courts has not yet been rendered, Appellant's quest for review by this Court is premature and is not within the "final judgment" jurisdiction of 28 USC § 1257.

Finally, this case does not meet the "collateral order" exception first recognized in *Cohen*. To come within that exception,

---

420 US at 479). In the instant case, even if all federal issues are resolved favorable to Appellant this will not conclude or preordain the outcome of the pending product liability suit.

Where, as here, none of the four criteria are met, the necessity of further state court proceedings precludes construction of an interlocutory order as a "final judgment". An appeal or petition for certiorari must be dismissed for failure to meet the "final judgment" threshold necessary to invoke §1257 jurisdiction. *Flynt, supra.*

[6]Under Michigan appellate procedure, a dissatisfied litigant can pursue a discretionary appeal from any Circuit Court order which is not a "final judgment appealable as of right", GCR 1963, 806.2(2). VWAG's reliance on this provision in the Michigan appellate courts reflects its recognition that the discovery orders are not a "final judgment". Where the Court of Appeals declines to entertain a discretionary interlocutory appeal, the disgruntled litigant may nonetheless raise the same questions on an appeal of right from a "final judgment", GCR 1963, 806.1. In short, Michigan appellate procedure assures that if Appellant suffers an adverse judgment it may insist that the appellate courts resolve the merits of its federal arguments on an appeal of right.

three circumstances must exist, "the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand*, 437 US at 468. See also *Firestone Tire & Rubber Co*, 449 US at 375.

For the reasons previously expressed, the discovery order does not "conclusively" determine the disputed question, for the order can be modified by the trial judge or reviewed on appeal from a final judgment. The discovery question is not "completely separate from the merits of the action"; indeed, the depositions seek to determine the merits and may be determinative of the merits if introduced at trial. And, finally, the decision may be effectively reviewed on appeal from a final judgment.

The Court has uniformly stated, at least in criminal cases, that a pre-trial discovery order is not a "final judgment" or "final order" and is therefore not ordinarily appealable. It is only where the discovery order is directed to a non-party witness that the "collateral order" doctrine may be invoked.[7] *Uni-*

[7]Where, as here, the discovery order is directed to a party, the order is not itself a final judgment. The party may elect to disobey the order and, upon the imposition of sanctions, *then* appeal from the final order. *Ryan, supra.* Thus, where the discovery order is directed to a party, an effective appeal from a final judgment exists and the third criterion of *Cohen* is unsatisfied.

A non-party witness against whom discovery is directed as unlikely to opt to disregard the order and then appeal from the final judgment imposing sanctions. And, there is a serious question whether a non-party has standing to appeal from a final judgment in the underlying litigation. These considerations reflect the critical distinction between discovery orders directed to non-parties (which may be appealable under the "collateral order" doctrine) and discovery orders directed to parties (which are non-appealable).

Appellees have repeatedly disavowed any coercion or intent to obtain any sanctions or other relief against the German deponents. Nothing will be done to them if they decline to appear. The only entity against which the Order is directed, and against which sanctions might be imposed, is VWAG, a party over which the Circuit Court has unquestioned personal and subject matter jurisdiction. As the discovery order is directed to a party, it cannot be appealed under the "collateral Order" doctrine as interpreted in *Ryan, Nixon* and *Jascalevich.*

ted States v *Ryan*, 402 US 530 (1971); *New York Times Co* v *Jascalevich*, 439 US 1317, 1318-1319 (1979); *United States* v *Nixon*, 418 US 683, 690-691 (1974).

If the Court perceives that its prior decisions do not foreclose Appellant's reliance on the "collateral order" doctrine, it must nonetheless decline to expand the scope of the doctrine. The most that can be said for VWAG's position is that it may be forced to decide whether to adhere to the order despite its discontent, or risk the imposition of sanctions to bring the matter to a head. This dilemma is no different than that faced by any litigant dissatisfied with an adverse ruling that is not immediately appealable. The dilemma is an inherent attribute of the finality requirement; it is no reason to ignore that requirement.

Arrayed against the inconvenience to Appellant are the host of compelling considerations which provide the underpinnings of the long-standing finality doctrine, all of which forcefully apply to the instant case. One principle underlying the final judgment requirement is the need to avoid the obstruction of meritorious claims or impediment to ongoing judicial proceedings that interlocutory appeals engender,[8] *Firestone Tire & Rubber Co*, 449 US at 374; *United States* v *Nixon*, 418 US at 690. Others are the need to accord deference to the trial bench and avoid undermining the authority of a trial court,[9] *Firestone Tire & Rubber Co, supra*, and the need to promote the efficient administration of justice[10], *Firestone Tire & Rubber Co, supra*;

[8]In the instant case, Appellees have not yet received a trial on the merits on their attempt to obtain redress for the catastrophic injuries sustained nine years ago. The record is rife with evidence of VWAG's efforts to obstruct meaningful discovery in this and other American product liability actions.

[9]Although the international facets may be interesting, the discovery order in question is typical of the sort of pre-trial ruling which trial courts across the nation are called on to make on a daily basis.

[10]In view of the aggressive litigation stance taken by Appellant, it is virtually certain that this is not the last appellate salvo. The efficient administration of justice, particularly for an overloaded Court such as this, is far better served by awaiting final judgment so that all issues can be resolved in a single appeal than by repeated piecemeal appeals that, by design or happenstance, protract the ultimate termination of the litigation.

United States v *Nixon, supra.* Still another underlying policy is to avoid protracting the ultimate termination of the litigation[11], *United States* v *Nixon, supra.* Finally, due deference to the state courts dictates that this Court wait until final judgment, until the state courts have fully and finally resolved the federal issues, before involving itself in pending state litigation. The full arrary of policy considerations underlying the "final judgment" limitations of 28 USC § 1257, when considered against the more limited policies relied on by Appellant,[12] dictate that the pretrial discovery order not be deemed within the "collateral order" doctrine announced in *Cohen.*

In sum, the pretrial discovery order is not a "final judgment". It may not be reviewed by appeal or certiorari at this juncture, as it is not within the jurisdiction established in 28 USC § 1257. Viewed as either an appeal or petition for certiorari, Appellant's pleadings must be dismissed as beyond the Court's jurisdiction.

III.
THE QUESTIONS ON WHICH THE DECISIONS OF THE STATE COURTS DEPEND ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

At the core of Appellant's argument is the assertion that the body of law between the United States and West Germany does not allow the consular questioning procedure embodied in the Circuit Court order. That order, by its very terms, authorizes only such procedures as are allowed by the Notes Ver-

[11]See footnote 10 above.

[12]Appellant's attempts to raise the spectre of awesome international implications are simply unpersuasive. The case law dealing with the Hague Treaty reveals that virtually all of the case law involves VWAG. Presumably other litigations find that questioning of their foreign employees is no substantial inconvenience. And, other signatories to the Hague Treaty have found no cause for alarm in international discovery procedures. One can scarcely resist the conclusion that the Treaty is being invoked by VWAG to avoid the truth-seeking process rather than to resolve any momentous questions of international law.

bales (24a). Thus, the decisive question is whether the Hague Treaty forecloses two signatory nations such as West Germany and the United States from adopting by Notes Verbales procedures more favorable to international evidence-taking than the minimal guarantees of the Treaty.

In more recent years, commercial transactions have become increasingly international in nature. With the multiplication of international transactions came a multiplication in international lawsuits arising out of those transactions. As a result, there arose a need to adopt international procedures sufficient to allow the just disposition of international litigation.

Prior to 1939, the German government had allowed American consular officials to take depositions of American citizens but had not allowed American consular officials to take the depositions of German nationals (61a). In the wake of World War II, international claims between United States and German litigants skyrocketed. See *Uerbersee Finanz-Korporation, Etc* v *Browning,* 121 F Supp 420, 426 (Dist Col, 1954). Accordingly, the American government inquired by Note Verbale of February 11, 1955 whether German law still prohibited consular officers in Germany from taking the depositions of non-Americans (61a-62a).

The German government responded on January 13, 1956:[13]

> "In consideration of the reciprocity granted by the United States, no objections will in future be raised to the questioning of German or other non-American nationals by American consuls in the Federal Republic." (64a).

The 1955 and 1956 Notes Verbales have never been revoked. As provided, the American government has accorded the referenced "reciprocity" (i.e., American nationals can be ques-

[13]The response contained certain assumptions regarding the nature of the questioning. The trial court's order embodies these limitations. It must therefore be assumed that the questioning will be conducted in strict compliance with the Notes Verbales.

tioned by German consular agents in the United States). As a result of the agreement embodied in the Notes Verbales, a workable procedure evolved for litigation involving America and Germany.

Other nations had not been so successful in adopting workable procedures. In response to this problem, the Hague Treaty was developed to provide for minimal guarantees to be afforded in litigation involving the signatory nations. The Hague Treaty (36a-50a) was expressly intended and adopted "to improve mutual judicial cooperation in civil or commercial matters" (36a). A signatory to the Treaty guarantees that it will extend to all other signatory nations the courtesies spelled out in the Treaty.

Among the optional provisions of the Treaty is Article 16. In essence, this Article permits a diplomatic officer or consular agent of one country to take testimony in aid of proceedings commenced in his country, from nationals of the country wherein he exercises his diplomatic functions. This "consular questioning" procedure is available if the foreign nation "has given its permission either generally or in the particular case" or if the foreign nation has declared "that evidence may be taken under this Article without its prior permission" (42a).

When Germany ratified the Treaty, it opted not to include its consent to the general provisions of Chapter II, which includes Article 16. As a result, it was not obliged to allow "consular questioning" by the world at large. However, other provisions of the Treaty permit signatory nations to allow between themselves procedures more liberal than those extended to other countries, Article 27, Article 28, Article 32. Under the Treaty, any difficulties in regard to the Treaty are to be settled through diplomatic channels, Article 36.

Uncertainty arose as to whether the reservations contained in the German ratification of the Treaty affected the preexisting consular questioning privileges extended to the United States. This question was resolved through diplomatic chan-

nels by the exchange of Notes Verbales. On October 17, 1979, the German government stated:

> "With reference to its Note Verbale of November 15, 1978 (512-521.60 USA) concerning legal assistance in civil and commercial matters, the Foreign Office has the honor of informing the Embassy of the United States of America that the agreement between the Foreign Office and the Embassy of the United States of America on the questioning, by consular officers of the United States, of German or other non-American citizens in the Federal Republic of Germany, under the conditions stipulated there, which was concluded by the exchange of notes on February 11, 1955, January 13, 1956, and October 8, 1956, is still considered valid by the German side, as the Hague convention of March 18, 1970, on the taking of evidence abroad in civil or commercial matters, became effective for the Federal Republic of Germany on June 26, 1979."

With this background, it is apparent that the issue raised is insubstantial. The Treaty itself contemplates that interpretive problems are to be resolved through diplomatic channels rather than by the judiciary. Thus, it is far from clear that the Treaty was intended to give rise to a judicial remedy. Nor is it clear that this is the type of "political question" in which the Court may properly become involved. See *Baker* v *Carr*, 369 US 186, 211-212 (1962). Where, as here, the respective nations have agreed through diplomatic channels (American diplomacy being an executive function) on a diplomatic issue, this Court must be most hesitant to impose its views of what diplomacy requires. In short, if both governments are satisfied with allowing reciprocal consular questioning privileges, it is scarcely the province of this Court to tell them not to.[14]

And if judicial review may nonetheless be provident, it can

[14] Were the Court to find it improper for American consular officials to question German nationals for American litigation, the American government would predictably revoke the reciprocal privilege which it has heretofore extended to Germany. See Article 33 of the Treaty, final paragraph (46a).

hardly be said that the Notes misinterpret international law. The Treaty specifically allows signatory nations to adopt the consular questioning procedure, Chapter II, Articles 15-22, 41a-44a. While Germany has declined to extend these privileges to the world at large, nothing in the Treaty prevents it from extending these privileges to the United States. To the contrary, the Treaty establishes only minimal standards of cooperation and encourages individual countries to extend between themselves higher levels of cooperation. Certainly nothing in the letter of the Treaty forecloses the United States and Germany from allowing consular questioning per the Notes Verbales.

Appellant's interpretation of the Treaty would contract the reciprocal rights conferred by the Notes Verbales of 1955 and 1956. Such an interpretation is belied by the very purpose of the Treaty "to *improve* mutual judicial cooperation" (36a).

At minimum, the interpretation placed on the Treaty by the State Department and its German counterpart, the agencies charged with the duty of carrying out its provisions, is entitled to substantial weight. As both have viewed consular questioning as permissible after the Treaty, this Court should defer to that construction.

In sum, Appellant's argument that the consular questioning is prohibited by the Hague Treaty, despite the Notes Verbales, is insubstantial.[15] This is further demonstrated by considera-

[15]In asserting that its argument is substantial, VWAG relies on two California cases, *Volkswagenwerk Aktiengesellschaft v Superior Court Alameda County*, 176 Cal Rptr 874 (1981) (hereinafter "VWAG, 1981" and *Volkswagenwerk Aktiengesellschaft v Superior Court In and For Sacramento County*, 109 Cal Rptr 219 (1973) "VWAG, 1973". Neither case is persuasive.

In VWAG 1973, the plaintiff attempted a "commission" procedure rather than the "consular questioning" procedure involved in this case. It is apparent that VWAG and its counsel failed to inform the Court of the Notes Verbales of 1955 and 1956. A decision which takes no account of the Notes Verbales can hardly influence the instant case where the order in issue is expressly predicated on the procedures permitted by the Notes.

In VWAG, 1981 the Court was plainly in error in concluding that "the Notes Verbales do not qualify the positions of the United States and West

tion of Appellant's related argument that testimony may be obtained only by the Letters Rogatory procedure.

The notion that the testimony of German nationals can be obtained for American litigation only by the Letters Rogatory procedure has been dispelled by VWAG itself. It has obtained in affidavit form the testimony of the proposed deponents without being required to submit Letters Rogatory (see 4b).[16] This vividly dispels Appellant's argument that the testimony of German nationals for American litigation cannot be obtained without the Letters Rogatory procedure.

IV.
THE ORDERS IN ISSUE REST ON ADEQUATE NON-FEDERAL GROUNDS AND ALTERNATIVE RATIONALES WHICH MAKE THIS CASE AN INAPPROPRIATE ONE FOR CERTIORARI.

Appellant suggests that this case presents a simple, single

Germany under the Hague Convention in any relevant respect" (176 Cal Rptr at 883). Moreover, the California Court was apparently troubled by the prospect that the Order in question went beyond the bounds permitted by the Notes Verbales.

In the instant case, the trial judge used the term "depositions", the same term used in the treatises and, indeed, the original American Note Verbale. While there might be some question as to the nature of the procedure allowed by the Circuit Court in this case (due to initial confusion over the status of international law), the specific citation of the Notes Verbales makes it clear that the procedures approved are only those authorized by the Notes.

For present purposes, it must be assumed that the consular questioning will proceed in strict conformity to the Notes. Should the bounds of the Notes be exceeded, judicial intervention might *then* be appropriate. It would be entirely inappropriate for the Court to accept this case on the basis of unfounded speculation that Appellees might at some later date do something inappropriate.

[16]The representative affidavit is included solely for illustrative purposes. The substance of the affidavit — that Mr. Seiffert has never testified at trial on behalf of VWAG and that his duties do not include providing testimony in connection with litigation — is, at best, grossly misleading. In fact, Mr. Seifert provided deposition testimony favorable to VWAG in the California case of *Burney v VWAG*, Los Angeles County Superior Court # 983 505 on June 25, 1979.

issue — whether the Order offends the Hague Treaty or other agreements between the United States and Germany. In fact, this case also presents a number of additional issues which provide alternative rationales for the conclusions reached below.

These grounds may be viewed as adequate non-federal bases for the decisions reached. As such, the correct result was reached, irrespective of how the narrow academic question is decided. Where an independent state ground exists in support of the lower court decisions, this Court will ordinarily not entertain an appeal since its decision on the federal issues cannot affect the result. *City of Mesquite v Aladdin's Castle, Inc,* 455 US 283, 292 (1982); *Zacchini v Scripps-Howard Broadcasting Co,* 433 US 562, 566 (1977). To the extent that the following rationales constitute adequate state grounds for the orders below, the appeal must be dismissed.

In this regard, the state courts have never issued any opinion explaining whether their decision rests on federal or nonfederal grounds. The implication of this posture is explained in Stern & Gressman, Supreme Court Practice (5th ed), p. 234:

> "Where both federal and nonfederal questions are properly raised in the record but no opinion is delivered by the highest state court in rendering its judgment, or the opinion is ambiguous, the Supreme Court ordinarily presumes that the decision is based upon a nonfederal ground raised in the record which may be found adequate to support it. This presumption grows out of the principle that there must be some affirmative showing in the record that a federal question was presented to the state court and that a decision on such question was necessary to a determination of the cause. Where this is not clearly indicated, especially because of the presence of an adequate nonfederal ground, jurisdiction will be declined."

The alternative grounds also demonstrates that the ultimate outcome involves far more than the academic argument posited by Appellant. These alternative grounds suggest that the case

does not involve a "clean" legal issue, a factor which militates strongly against granting certiorari.

A.

VWAG IS ESTOPPED TO PRESENT ITS ARGUMENT

Michigan law recognizes that a party may be estopped to assert a meritorious legal position by its previous silence and admissions. *Kole* v *Lampen*, 191 Mich 156, 157-158 (1916); *Pleger* v *Bouman*, 61 Mich App 558, 561 (1975). In this case VWAG originally raised no objection to the objections and agreed to provide the witnesses (1b-4b). Had Appellant's argument (if meritorious) been asserted in a more timely fashion, the federal issue would have been resolved by now. If necessary, Appellant could have proceeded under the Letters Rogatory procedure. Having by its acquiescence delayed the taking of testimony which Appellant seeks, VWAG is estopped under Michigan law to seek to further delay Plaintiff's day in court by its present arguments.

In addition, VWAG has *itself* presented sworn testimony (by affidavit) of the deponents. Having successfully obtained the testimony of German nationals in a manner not contemplated by the Hague Treaty, Appellant cannot seek to foreclose Appellees from the same procedures VWAG has itself successfully employed in this very lawsuit.

B.

THE HAGUE TREATY IS NOT RETROSPECTIVE IN OPERATION.

At the time this lawsuit was commenced, the procedure in effect was that allowed by the Notes Verbales of 1955 and 1956. The Hague Treaty, on which Appellant relies, was not ratified until June 26, 1979, *after* the commencement of this lawsuit.

Under Michigan law, statutes are deemed to be prospective only and therefore inapplicable to lawsuits pending prior to the enactment. *Mary* v *Lewis*, 399 Mich 410 (1976); *McQueen* v

Great Markwestern Packing Co, 402 Mich 321 (1976). Foreign law is presumed to be the same as Michigan common law. *In re High*, 2 Doug 515 (1847); *Crane* v *Hardy*, 1 Mich 56 (1848). To sustain its argument, it was incumbent upon Appellant to show that the German law of retroactivity is different than that of Michigan. As Appellant failed to do so, Michigan procedure required the Circuit Court to apply German law as Michigan law would be applied — in a non-retroactive fashion that would make it inapplicable to this preceding cause of action.

C.

VWAG, WHICH IS CLOSELY CONNECTED TO THE GERMAN GOVERNMENT, CANNOT STIFLE LEGITIMATE DISCOVERY ON THE BASIS OF GERMAN LAW.

Appellees believe, but cannot conclusively demonstrate, that a substantial portion of VWAG's stock is owned by the West German government.[17] Appellant has never suggested that this belief is inaccurate.

The case law has recognized the principle that a foreign litigant, closely allied with a foreign government, will not be heard to stifle legitimate discovery on the basis of the purported law of the foreign country, as the litigant is in the most advantageous position to request its sovereign to relax any law that would obstruct discovery. See *Petruska* v *Johns-Manville Products Corp*, 83 FRD 53 (1979); *Ghana Supply Commission* v *New England Power Co*, 83 FRD 586 (1979); *Societe Internationale Pour Protections Industrielles* v *Rogers*, 357 US 197, 205 (1958). This alternative rationale also supports the decisions of the state courts.

[17] It is commonly known that VWAG was formed at the behest of Adolph Hitler who, as German Chancellor, commissioned Dr. Porsche to develop a small economical vehicle for the transportation of the German populace. From these seeds sprang the Volkswagen or "people's car". It is the understanding of Appellees that after World War II, VWAG, or a portion of its stock, remained under the control of the government.

D.
VWAG LACKS STANDING TO ASSERT THE RIGHTS OF THE GERMAN GOVERNMENT.

Let us assume, contrary to the preceding argument, that VWAG is not related to the German government. Under that analysis, substantial standing questions arise.

If any principle of standing jurisprudence is well-settled, it is the axiom that a litigant may not assert the rights of strangers to the litigation. "[T]he plaintiff generally must assert his own legal rights and interests, and cannot claim to relief on the legal rights or interests of third parties." *Valley Forge College* v *Americans United for Separation of Church and State*, 454 US 464, 474 (1982).

The rights afforded by the Hague Treaty are rights of the German government. Such rights are to be asserted by the government as an entity, and may not be invoked by one who is simply a citizen. *Valley Forge College, supra* (American citizens, claiming "injury in fact" held not to have standing to assert purported rights of the United States government).

In the instant case, the German government has agreed to the consular questioning procedure through the Notes Verbales. The government has never sought to intervene, and filed nothing in the Circuit Court prior to the only ruling on the merits.[18] Where, as here, the German government has construed

[18] As part of its Appendix (72a), VWAG has included a purported letter sent to the Michigan Supreme Court. Such *ex parte* matters, which are not a part of the record, cannot be considered by this Court. And, if consideration of *ex parte* letters is appropriate, the unsigned letter cannot change the propriety of the Circuit Court's ruling, for *nothing* of the nature was filed in the name of the German government prior to the order of which Appellant seeks review. The position of "sign Hermes", which flatly contradicts the official governmental position expressed in the Notes Verbales, is apparently based on the misapprehension that the Circuit Court Order does not adopt the Notes Verbales. It is a sufficient answer that it must be presumed, at this premature juncture, that the Notes will be scrupulously adhered to. See fn 15, *supra*.

its agreement with the United States as allowing consular questioning, a litigant cannot assert the interests of the German government to the contrary.

E.
A COURT MAY EXERCISE JURISDICTION OVER THOSE WHO VOLUNTARILY APPEAR BEFORE IT.

Virtually all of the proposed affiants submitted affidavits attesting, in essence, that they had appeared voluntarily. These affidavits requested affirmative relief from the trial court in the nature of quashing the testimony scheduled. In addition, two of the proposed deponents have appeared in Michigan, one of them to inspect the vehicle.

Under Michigan law, even where no jurisdiction over the person would otherwise exist, a person who voluntarily appears and seeks affirmative relief has thereby subjected himself to the Court's *in personam* jurisdiction. *Cofrode* v *Circuit Judge*, 79 Mich 332, 338 (1890); *Golden Star Judge #1* v *Watterson*, 158 Mich 696, 699 (1909); *National Coke Co* v *Cincinnati Gas, Coal & Mining Co*, 168 Mich 195, 197 (1911); *Macomb Concrete* v *Wexford Corp*, 37 Mich App 423, 425 (1971).

Appellant has cited nothing which would preclude German nationals from voluntarily participating in American litigation. VWAG has itself successfully enlisted the voluntary participation of its German employees. As the deponents elected to seek relief from the Circuit Court and appeared before the Court for that purpose, they may be subjected to the rulings of the Court, irrespective of what powers the Michigan Courts might have employed absent voluntary appearance.

In short, there are adequate non-federal grounds which support the state court decisions. The appeal must therefore be dismissed.

WHEREFORE, Appellees pray that this Honorable Court

Dismiss or Affirm and that the Court allow Appellees the taxable costs and attorney fees of these appellate proceedings.

ZEFF & ZEFF
BY: MICHAEL T. MATERNA
RONALD W. SZCZESNY
Attorneys for Plaintiffs
607 Shelby St., Suite 200
Detroit, Michigan 48226
(313) 962-3825

GROMEK, BENDURE & THOMAS

BY: /s/ MARK R. BENDURE
Attorneys of Counsel for
Plaintiffs-Appellees
577 E. Larned, Suite 210
Detroit, Michigan 48226
(313) 961-1525

Dated: June 17, 1983

APPENDIX

I

INDEX TO APPELLEE'S APPENDIX

(Title of Court and Cause)

AFFIDAVIT OF RONALD W. SZCZESNY

STATE OF MICHIGAN)
COUNTY OF WAYNE) ss.

Ronald W. Szczesny, being first duly sworn, deposes and states the following is true to the best of his knowledge, information and belief.

1. That he is an attorney with the law firm of ZEFF AND ZEFF who represent the Plaintiff in this matter.

2. That he has participated in much of the discovery, pleadings and motions of this case.

3. That on April 18, 1980, he participated in an emergency motion to take the Deposition of a Volkswagen Engineer named Frank Achcenich.

4. That on the afternoon of April 18, 1980, he called Mr. Noel Gage and told Mr. Gage that Plaintiff's counsel decided they would not take Mr. Achcenich's Deposition, when Mr. Achcenich was here for the vehicle inspection but would schedule that Deposition and those of other Volkswagen Engineers in Germany at a later date. He further stated to Mr. Gage that it would probably be prior to the latter part of September. Mr. Gage indicated that would be a satisfactory time to schedule such Depositions.

5. That on May 12, 1980, he sent a letter to Mr. Noel Gage reiterating the conversation of April 18, 1980 regarding the imminent scheduling of Depositions in Germany (See Exhibit 1)

6. That in a telephone conversation held on June 17, 1980, Mrs. Schecter indicated that she had applied for her passport and did not have any objections to the Depositions in Germany and in fact looked forward to going to Germany.

7. That on June 25, 1980, he noticed the Depositions of thirteen (13) Volkswagen employees for the week of August 4, 1980. (See Exhibit 2)

8. That on June 26, 1980, he sent another letter to Mrs. Schecter confirming the conversation of June 27, 1980 and again referred to the upcoming August 4, 1980 Depositions in Germany.

9. That in the case of Wieczorek v. Volkswagen, Mr. Noel Gage indicated in a Motion to Adjourn the Trial in that matter, that the Trial, in that matter, could not proceed because of the upcoming Depositions in Germany in the Falzon case which they planned on attending.

10. That on July 17, 1980, at the Deposition of Dr. Nagler, Mr. Gage stated that the Depositions in Germany could not proceed in August since he would be at the American Bar Association Convention in Hawaii, but rather, the Depositions would have to be scheduled for the end of September. Mr. Gage further stated that he could not guarantee the safety of Plaintiff's counsel since Wolfsburg is a company town and its citizens would be very angry toward anyone suing Volkswagen.

11. That the afternoon of July 24, 1980 was the first time that Volkswagen counsel ever indicated any opposition to the Depositions in Germany and was the first time the Hague Convention was ever mentioned.

Further affiant sayeth not.

/s/ Ronald W. Szczesny

RONALD W. SZCZESNY

Subscribed and sworn to before
me this 31st day of July, 1980.
/s/ Deborah DeMan

Deborah DeMan, Notary Public
Macomb County, Michigan
Acting in Wayne County
My Commission Expires: 2-5-83

ZEFF AND ZEFF
Attorneys and Counselors at Law
30th Floor Guardian Building
Detroit, Michigan 48226

May 12, 1980

Noel Gage, Esq.
3000 Town Center
Ste. 1500
Southfield, Michigan 48075

Re: Falzon v. Volkswagen

Dear Mr. Gage:

Pursuant to our conversation on April 18, 1980, I look forward to having dinner with you on the Rhine. As I had indicated I don't think I can stall it until the Oktoberfest. I will be contacting you shortly to arrange some mutually convenient dates for Depositions.

As I suggested, make your passport arrangements now as I already have mine.

Auf Wiedersehn,

Ronald W. Szczesny

RWS/lc

ZEFF AND ZEFF
Attorneys and Counselors at Law
607 Shelby Street
Suite 200
Detroit, Michigan 48226

June 26, 1980

Lynn Shecter
3000 Town Center, Ste. 150
Southfield, Michigan 48075

Re: Falzon v VWAG

Dear Ms. Shecter:

This letter is to confirm our agreement by telephone of June 17, 1980, wherein I indicated and you agreed that if you did not express any opposition by June 20, 1980, I would notice the depositions of several VWAG employees in Wolfsburg, Germany to proceed the week of August 4, 1980 and continue to completion.

I assume you will have received the deposition notice by the time you receive this letter and have no objections.

See you in Germany.

Very truly yours,

Ronald W. Szczesny

RWS:sy

(Title of Court and Cause)

AFFIDAVIT

ULRICH SEIFFERT, being duly sworn, deposes and says:

1. I am a citizen and a resident of the Federal Republic of Germany and I am head of research for Volkswagenwerk AG.

2. I was not responsible for the design, development, testing, manufacture or assembly of the 1973 Volkswagen Type II vehicle.

3. I do not have any familiarity with the details of the above-captioned matter nor have I been consulted with respect to any of the allegations which have been raised therein and I do not intend to appear as an expert on behalf of Volkswagenwerk AG at the time of the trial of this matter even if requested.

4. I have never testified at trial as an expert witness on behalf of Volkswagenwerk AG either with respect to Volkswagen vehicles in general or in litigation involving "rollover characteristics" or any "door latch systems" or concerning "side wind performance."

5. In view of my lack of familiarity with this matter, as well as my personal commitments and professional responsibilities, the giving of testimony or information in conjunction with this matter would be disruptive to my personal schedule and would interfere with my business responsibilities.

6. My duties do not include assisting counsel or providing testimony in connection with litigation. Thus, if received, I would respectfully decline a request by my employer or an invitation from others to provide information or give testimony herein.

7. I have never been known by the name of "Wrich Siefert" and am not acquainted with such an individual.

/s/ ULRICH SEIFFERT
Ulrich Seiffert

Sworn to before me this
22nd day of October, 1980

Notar

Urkundenrolle Nummer 247/1980

Herrn Dr. Ulrich Seiffert, 3300 Braunschweig, Jahnskamp 22 wurde auf Verlangen diese Urschrift ausgehandgt.

Braunschweig, den 22.October1980

Notar

28 USC §1257

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

"(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, trealties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or states of, or commission held or authority exercised under, the United States.

"For the purposes of this section, the term 'highest court of a State' includes the District of Columbia Court of Appeals."

RULE 304 Persons Before Whom Depositions May Be Taken.

.1 Within the United States. Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken (1) before a

person authorized to administer oaths by the laws of this state or of the United States or of the place where the examination is held, or (2) before such person as may be appointed by the court in which the action is pending, or (3) before any person upon whom the parties agree by stipulation in writing or on the record. A person so appointed or agreed to shall have the power to administer oaths, take testimony, and do all other acts necessary to take an effective deposition.

.2 In Foreign Countries. In a foreign state or country depositions shall be taken (1) before a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or (2) before such person as may be appointed by commission or under letters rogatory, or (3) before any person upon whom the parties agree by stipulation in writing or on the record. Such persons have the power to administer oaths, take testimony, and do all other acts necessary to take an effective deposition. A commission or letters rogatory shall be issued only when necessary or convenient, on application or notice, and on such terms and with such directions as are just and appropriate. Persons may be designated in notices or commissions either by name or descriptive title and letters rogatory may be addressed "To the Appropriate Judicial Authority in (here name the country)."

.3 Disqualifications for Interest. No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action unless the parties agree by stipulation in writing or on the record to the contrary.

RULE 518 Judgments.

.1 Decree. "Judgment" as used in these rules shall include a decree as heretofore known.

.2 Judgment Upon Mutiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in action whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is not just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

.3 Demand for Judgment. A judgment be default shall not be different in kind from, or exceed in amount, that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

.4 Exceptions Unnecessary. No exception need by taken to any judgment.

[Amended March 1, 1964.]

RULE 806 Appeals by Right and by Leave.

.1 Appeal as of Right. In all criminal and civil matters, an aggrieved party shall have a right to appeal from all final judgments or final orders from the Circuit Courts, Court of Claims and Recorder's Court, except judgments on ordinance violations in the Traffic and Ordinance Division of Recorder's Court. Appeals from final judgments from all other courts and

from convictions for ordinance violations in the Traffic and Ordinance Division of the Recorder's Court shall be taken to the Circuit Courts, upon which further review may be had only upon application for leave to appeal granted by the Court of Appeals. Final judgments or interlocutory orders of courts which by law are appealable to the Circuit Court only upon leave or on appeal are to be tried do novo in the Circuit Court shall continue to be tried in the Circuit Court. Se sub-rule 701.1. Appeals from final or interlocutory judgments of the District Court, Common Pleas Court, or judgments in ordinance cases in the Traffic and Ordinance Division of Recorder's Court shall be taken to the Circuit Court in which such court is located. Appeals as of right shall be taken in accordance with and within the time prescribed by these rules.

.2 Appeal by Leave. The Court of Appeals may grant leave to appeal from:

(1) Final or interlocutory judgments or orders of administrative agencies or tribunals which by law are appealable to the Court of Appeals or the Supreme Court.

(2) Any judgment, order, act or failure to act by the Circuit Courts, Court of Claims, and Recorder's Court, except on ordinance violations in the Traffic and Ordinance Division of Recorder's Court, which is not a final judgment appealable as of right.

(3) Orders in domestic relations cases for temporary alimony, payment of expenses, or support or custody of minors entered prior to final judgment shall be deemed interlocutory in nature and appealable only by leave.

(4) Final judgments entered by the circuit court on appeals from any other courts.

(5) Such other matters as are provided by the rules of the Supreme Court or other laws.

If an application (under either subrule 806.4[1] or [2]) in a

civil case is filed more than 18 months after entry of the order or judgment appealed from, leave to appeal may not be granted.

.3 Procedure for Leave to Appeal. To obtain leave to appeal to the Court of Appeals, appellant shall within the time limited for taking an appeal as of right, except when delayed appeal is sought:

(1) Prepare an application for leave to appeal as follows:

(a) The application shall set forth the reasons and grounds for granting leave to appeal. The court will pay particular attention to the following reasons and grounds:

(i) Where appeal as of right is not expressly allowed by statute or rule from a final judgment or order. The showing of any condition for appeal required by statute or rule and that the matter asserted is either of major significance to the jurisprudence of the state or that the decision is clearly erroneous.

(ii) In all interlocutory matters. That the trial judge has certified that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, or if it is shown by the appellant that the matter is either of major significance to the jurisprudence of the state or that the decision is clearly erroneous and appellant would suffer substantial harm by awaiting final judgment before taking appeal.

(b) The application shall have attached to it a proposed concise statement of the proceedings and facts as far as they are material. In all cases where error is alleged in the charge of the court, the whole of the charge shall be set up in the statement. It shall also contain the calendar entries to date, the date of entry and a copy of the judgment or order appealed from, and the opinion or findings of the court, if on file, or dictated to the court reporter.

(c) If defendant desires bail pending appeal in criminal cases, the application shall state the amount of bail set by the trial court pending application for leave to appeal, if any was set.

(2) Serve a copy of the application and proposed concise statement on all other parties whether joint or adverse, with notice of prompt settlement of the statement before the trial judge or any other judge having authority to perform necessary acts in the review process. See sub-rule 812.9.

The trial court may after a hearing, on a motion filed and served within 20 days from the entry of an order appealed from, extend the time for taking the above steps for a period not exceeding 30 days. The Court of Appeals may grant further time on motion filed within such extended period.

(3) Objections to the concise statement shall be settled promptly by the judge, and, when satisfied, he shall certify that it fairly presents the questions for review.

(a) A transcript of the testimony shall not be required as a basis for the settlement. The judge settling such statement may correct it or add matters of record which he may deem necessary to present the issue properly. When a discretionary action of the court is to be reviewed, the judge may add to the statement his reasons for such action.

(b) In case either party objects to the statement by the judge, he may file in the Court of Appeals affidavits, copies of pleadings, exhibits or a transcript of the relevant testimony relating to the question for review and a copy thereof shall promptly be served on the other side.

(4) Within 10 days after the statement is settled and certified, appellant shall file 4 duplicate typewritten or printed copies of the application and certified statement along with 4 copies of documents filed by him pursuant to subsection (3) (b) hereof with the clerk of the Court of Appeals and notice it for hearing as a motion accompanied by 4 duplicate typewritten or printed copies of a brief in support thereof.

At least one of such copies shall be signed as provided in Rule 114. The day of the hearing shall not be earlier than 20 days after the notice except by agreement of counsel or order of the Court of Appeals.

(5) With service of notice of hearing, appellant shall serve on all other parties a copy of the documents filed under subdivision (4) hereof and make proof of service thereof. Any party may file a brief in opposition to the application, provided such brief is filed at least 5 days prior to the date of application is noticed for hearing. Four duplicate typewritten or printed copies of briefs and documents filed by appellee pursuant to subsection (3) (b) hereof shall be filed with the clerk of the Court of Appeals and a copy thereof shall be served on the opposite side.

(6) All briefs filed in support of, or in opposition to, applications for leave to appeal shall conform to the requirements of Rules 813 and 814.

.4 Delayed Appeal.

(1 In cases where timely appeal requires leave, application for delayed appeal shall be made as above provided, and, in addition, shall affirmatively show, by affidavit of facts, that the delay was not due to appellant's culpable negligence. Any party may file affidavits in opposition thereto.

(2) Where timely appeal would have been of right, application for delayed appeal need not be accompanied by settled statement of facts but shall affirmatively show, by statement of facts and brief, that there is merit in the claim of appeal and, by affidavit of facts, that the delay was not due to appellant's culpable negligence. The application shall be noticed for hearing as a motion. Any other party may file opposing statement, brief and affidavits.

Briefs filed in support of, or in opposition to, applications for delayed appeal shall conform to the requirements of Rules 813 and 814.

.5 Emergency Appeal. On showing of emergency, of appel-

lant's due diligence, and of the character of injury to him through observance of the above practice on application for leave to appeal, application may be made on ex parte statement of fact, showing of merit, and on proof of such notice to other parties as the circumstances permit, or excuse for lack of notice, an immediate consideration of the application may be prayed.

.6 Appeals from Administrative Bodies and Officers.

(1) To obtain leave to appeal to the Court of Appeals from an order, award, or action of any administrative board, officer, or tribunal, the appellant shall, except in cases of delayed appeal, within 20 days after the entry of the order, award, or action sought to be appealed, or within 30 days in appeals from Workmen's Compensation cases:

(a) File in the Court of Appeals 4 duplicate copies of an application for leave to appeal, setting out the reasons and grounds of appeal, accompanied by the original record certified as correct by the officer having custody thereof, with 4 duplicate copies of supporting brief; provided, however, if appellant has ordered such certified record from the officer having custody thereof and it has not yet been delivered, such record shall be filed within 10 days after delivery thereof to appellant.

(i) The certified record shall include all documents, files, pleadings, testimony, opinions of the board or officer, except such as may be summarized or omitted in whole or in part by stipulation of parties. Any testimony not then transcribed shall be filed as promptly thereafter as possible.

(ii) The certified record shall be separate from the application for leave to appeal and the original record shall be returned by the clerk to the board or department from which it originated after the final determination of such appeal, or denial of the application for leave to appeal.

(b) Notice the application for hearing as a motion in the Court of Appeals and serve copies of the application, record,

and briefs, on all other parties or their counsel, at least 20 days before the date of hearing or such shorter period as shall be stipulated by counsel or as ordered by the Court of Appeals.

(2) In proper cases, sub-rules 806.4 and 806.5 shall be applicable under this sub-rule 806.6.

(3) Upon the determination of such application by the Court of Appeals, the clerk shall enter an order in accordance therewith and mail copies to counsel for the parties. If the application is denied, the court may tax costs as on motion.

.7 Peremptory Order. Upon any application for leave to appeal, the court on its own motion or by stipulation of the parties, may in lieu of leave to appeal enter a final decision or issue an appropriate peremptory order.

.8 Costs on Denial of Leave. If leave to appeal is denied, costs shall be taxed as on motion unless otherwise indicated by the Court.

[Amended Jan. 1, 1965; July 13, 1965; March 1, 1967; Dec. 5, 1968; Feb. 13, 1969; June 1, 1973; June 10, 1975; June 2, 1978.]